

Elizabeth B. Harmon
P.O. Box 917
Oracle, AZ 85623
(520) 896-2889

Hearing Officer

ARIZONA DEPARTMENT OF EDUCATION
SPECIAL EDUCATION DUE PROCESS HEARING

PARADISE VALLEY UNIFIED SCHOOL)	
DISTRICT)	
)	
Petitioner,)	
)	
vs.)	
)	DECISION AND ORDER
STUDENT A and the Parents of Student)	
A)	
Respondents.)	
_____)	

INTRODUCTION

This matter came before the hearing officer upon the written request by Paradise Valley Unified School District (hereinafter "District") for a due process hearing. The District faxed a memorandum to the Arizona Dept. of Education requesting a hearing on January 30, 2001. Both parties were represented by legal counsel.

The purpose for requesting the hearing was to determine whether A was eligible for special education services with a specific learning disability in mathematics. The District contended that A was not eligible for special education services. The parents of A contended that he is eligible.

A pre-hearing conference was held on March 6, 2001. At the

pre-hearing conference counsel for the District orally requested an extension of the 45 day time limit. The reason given was the lateness of the appointment of the hearing officer and the inability of the parties to schedule a hearing date within the 45 day time frame due to prior commitments. The request was granted and the time was extended until April 18, 2001.

At the pre-hearing conference the hearing date was set for April 11 and 12, 2001. The 5 day rule for the exchange of documents was set for April 4, 2001. The parents requested that the hearing be closed. Counsel for the parents requested that all of A's student records, including test protocols from his evaluations be provided as soon as possible. The District was ordered to provide all records requested by March 13, 2001.

Counsel for both parties filed pre-hearing motions. The parents filed a Motion to exclude Petitioner's evidence of the psycho-educational evaluation of A performed by the District, for the reason that all the student records requested had not been provided in a timely manner. The District filed a motion regarding its Subpoena Duces Tecum served upon the Independent Evaluator to compel production of his records. A telephonic pretrial hearing was held on April 4, 2001 to hear argument on both motions. The hearing officer denied Respondents' motion to exclude the evaluation but ordered petitioner to disclose all remaining documents in its possession or which could be obtained by the end of that business day or such documents would be excluded. Petitioner's motion to compel was deemed moot, as the subpoena had been complied with at the time of the pre hearing

conference.

The hearing was conducted on April 11 and 12, 2001. During the hearing, at the District's suggestion, the deadline for completing a written decision was extended to April 30, 2001, in order that a transcript might be prepared and reviewed.

Toward the end of the second day of hearing the respondent sought to recall one of the District's witnesses, for the purpose of impeaching the witness' testimony with a tape recording made during a multi-disciplinary team meeting regarding A held on January 29, 2001. The District objected to the recall of the witness and to the use of the tape for failure to disclose the tape prior to the hearing. Respondent had disclosed, on his list of exhibits, "Any items or documents not previously disclosed which may be used for impeachment purposes." It was determined, in the interests of time, and because a tape player with a speaker could not be located, that the witness would be excused from testifying again. The tape recording, which was the only copy, was provided to the hearing officer, as evidence to be considered, following the close of the hearing, for impeachment purposes. A copy of the tape was provided to the District to review following the hearing. Both parties were given leave to file post-hearing briefs, which could include the issue of use of the tape for impeachment purposes.

The transcript of the two days of testimony were received by this hearing officer on April 30, 2001 and May 1, 2001, respectively. It was impossible to render a written decision until the date set forth below.

FINDINGS OF FACT

1. A first enrolled as a student in the District during the third quarter of his 7th grade year in the 1998-99 school year. He was not identified at that time as a child with a disability. His mother, however, provided information that he had been previously diagnosed with ADD. (District Exhibit #3)

2. At the time A enrolled, the mother of A inquired about testing A to determine if he had any learning disabilities. She was concerned because he had been doing poorly at the charter middle school where he had been previously enrolled. (Testimony of S.B., District school psychologist; District Exhibits 4 & 5)

3. A student study team was convened and the mother signed a consent to have testing done, but later withdrew the consent, indicating A did not want to be tested at that time. (Testimony of S.B., District psychologist.)

4. After a month, the student study team met again to discuss A's progress and it was determined that testing would not be done at that time. Reports from his teachers indicated he was doing average. (District's Exhibits # 9 & 10)

5. In January, 2000 the mother came in to the school and requested that A be tested for learning disabilities. She indicated that A's doctor had requested the testing. The doctor had diagnosed A with ADD. (Attention Deficit Disorder) At that time it was indicated by his math teacher that he was earning 43% in math. (Testimony of S.B., District psychologist; Exhibit 13)

6. A was evaluated by the District thereafter on February

16, 2000, during the third quarter of his eighth grade year. (Exhibit 14)

7. In evaluating A to determine whether he had a specific learning disability, the district utilized standardized tests to ascertain his ability and achievement levels. This was done in accordance with District Guidelines developed for the identification of students with specific learning disabilities. The guidelines set forth the process by which standard scores are compared in the areas of ability (intelligence) and achievement to determine whether a child has a severe or significant discrepancy between ability and achievement. (Testimony of B.L., District psychologist; District Exhibit #28)

8. The District guidelines included in Appendix B a list of recommended tests to use to determine estimated achievement (intelligence) and measured achievement. The tests administered to A were included on this list. (Testimony of S.B.; District Exhibit #28).

9. The ability (intelligence) test administered to A was the Wechsler Intelligence Scale for Children- Third Edition (WISC III). It was administered by S.B., the school psychologist. (Testimony of S.B., psychologist)

10. The achievement test administered to A was the Wechsler Individual Achievement Test (WIAT). It was administered by C.M., a special education teacher. (Testimony of S.B., psychologist)

11. The WISC III is comprised of subtests to assess a student's verbal I.Q. and his performance I.Q. The I.Q. scores of these two tests are combined to obtain a full scale I.Q.

(Testimony of B.L., psychologist)

12. A's verbal I.Q. was 108. His performance I.Q. was 102. His full scale I.Q. was 106. The full scale I.Q. is used to compare to a student's results on the achievement test because it is considered more consistent (reliable) over time. (testimony of B.L., psychologist)

13. The WIAT test, administered to A by special education teacher, C.M., consists of 7 subtests in various areas of achievement. There are three composite scores obtained in the areas of reading, mathematics and writing. A's composite score in mathematics was 97. (District Exhibit 14)

14. The District Guidelines, Appendix C, sets forth a table for comparing measured I.Q. scores to measured achievement scores to determine if there is a significant or severe discrepancy between the two. Correlations between the intelligence and achievement test measures are provided at the top of the table and are generally provided by the test publishers. The table indicates, using the student's composite I.Q. score, what achievement score is necessary for a severe discrepancy to exist. In A's evaluation, with a composite I.Q. of 106, and a correlation of .65, his standard achievement test score would have to be at or below 87 for a severe discrepancy to exist. A's achievement test score was 97. (Testimony of B.L. and S.B., psychologists; District Exhibits 14 and 28).

15. Based on the comparison of the results in the ability and achievement tests for A, S.B. determined in her evaluation that A was not eligible for special education services at that time.

(Exhibit # 14)

16. On 3/8/00 a multidisciplinary team met, attended by A's mother, in which the results of the evaluation were discussed. Notes of that meeting include comments by the teachers that he was not completing work and homework and a statement that there is no discrepancy between A's ability and achievement. (Exhibit 17)

17. No MET report was completed and no prior written notice prepared and provided to the parent at that time. (Testimony of S.B.)

18. In March, 2000 the parents of A requested an independent evaluation. This was approved by the District by letter on March 24, 2000. (Exhibit 18)

19. On April 12 and 26, 2000, an independent evaluation of A was performed by Dr. C.N., a clinical psychologist. (Testimony of C.N.; Respondent's Exhibit #2)

20. C.N. had available to him the psycho-educational evaluation performed by S.B., district psychologist. He determined that what needed to be done was to delve further into why A was having difficulties, particularly in the area of mathematics. He therefore administered a different ability test, the Wechsler Intelligence Scale for Children, Third Edition, as a processing instrument. (WISC III PI) (Testimony of C.N.)

21. The WISC III PI is designed to look at the factors that go into performance on each subtest, to understand why a student obtained the scores he did on the original WISC test. The subtests on the WISC III PI look at the student's performance on the various subtests of the WISC. (Testimony of Dr. C.N.; Respondent's

Exhibit 19)

22. A did poorly on the visual short term memory subtest and learning that involved spatial kind of tasks. Dr. C.N. also administered a matrix analogy subtest. Based on the results, Dr. C.N. concluded that A had a relative weakness in the right parietal lobe of his brain. This caused difficulty in processing information involving spatial visualization and combined with visual short term memory problems, was a specific type of disorder that tends to show up academically in terms of poor math performance. (Testimony of Dr. C.N.)

23. In determining that A had a learning disability in mathematics, C.N. did not use the discrepancy formula provided in the district guidelines. He used A's verbal intelligence score, reasoning that since his difficulties or weaknesses with visual spatial tasks were in the performance area score, that using the composite I.Q. score, in effect, penalized him. (Testimony of C.N.; Respondent's exhibit 2)

24. C.N. sent a copy of his evaluation to the parents and to the District's Director of Special Education, L.B. No evidence was presented that the District convened a MET team to consider the independent evaluation during the 1999-2000 school year. A letter dated May 22, 2000 was sent to A's parents by L.B., indicating that his evaluation would be sent to the psychologist for next year, who would be contacting them. (District Exhibit 20)

25. On August 9, 2000, A's mother contacted the counselor at the high school that A would be entering, requesting assurance

that A would be properly placed because he did qualify for special education services. (Testimony of B.L., psychologist)

26. Psychologist B.L. called the mother back that same date and set up a MET team meeting for August 23, 2000. B.L. told the mother she would obtain the evaluations by S.B. and C.N. at that time. (Testimony of B.L.)

27. At the meeting on August 23, 2000, both evaluations, as well as input from teachers and the results of Stanford 9 tests and placement tests for A were considered. Dr. C.N.'s independent evaluation that A had a specific learning disability in mathematics was not accepted. The stated reason was that Dr. C.N. established eligibility by using A's verbal I.Q. score of 108 instead of the composite score of 106 and that the full scale or composite score does not reflect the point discrepancy needed by district guidelines. (Testimony of B.L.; District Exhibit 22)

28. The team determined that A was not eligible for special education services in the category of specific learning disability. (Exhibit 22)

29. On August 31, 2000 the mother called B.L. and told her she had learned that A had used a calculator on the numerical operations portion of the testing on the WIAT, administered by C.M, special education teacher. She had conveyed this information to Dr. C.N. who had told her if that was true it would invalidate that portion of the test. B.L. agreed that if a calculator had been used it would invalidate the test. (Testimony of B.L.)

30. B.L. contacted C.M. to determine under what

circumstances

she administered the test. She then relayed that information to the mother. Mother was not satisfied with that information and wanted to see the test booklet. (Testimony of B.L.)

31. At some point, he could not remember when, but after his

parents had met with the psychologist and his teachers, A told his parents that when he took the math portion of the test administered by C.M. that he used a calculator. He did not know, and C.M. did not tell him, that using a calculator was not allowed and assumed it was okay because he was permitted to use it in his math class. (Testimony of A)

32. On October 4, 2000, B.L. met with A and his mother and the

school counselor. The purpose of the meeting was to talk about the WIAT booklet and A's admission that he had used a calculator. (Testimony of B.L.)

33. B.L. had a copy of the test booklet which had the math problems and A's answers and work on those problems. She went over some of the problems with A. She felt that because there was work shown on some of the problems that he had not used a calculator. She indicated there was little response from A or his mother when she went over the problems. Notes were taken of the meeting by the counselor but do not indicate that there was any discussion about the math problems or the calculator. C.M. was not at the meeting. (Testimony of B.L.; Exhibit #23; Respondent's Exhibit #27)

34. At the request of the mother, Dr. C.N. administered an achievement test to A on December 4, 2000, utilizing the Woodcock-Johnson Test of Achievement, Third Edition. (Testimony of Dr. C.N.; Respondent's Exhibit #3)

35. The scores on the arithmetic subtests, taken in December, 2000, utilizing the discrepancy formula in the District's guidelines, and comparing it to A's composite I.Q. score of 106, showed a significant discrepancy between ability and achievement. The evaluator, Dr. C.N., concluded that A had a significant learning disability in the area of mathematics and requested that the district review A's eligibility for services. Dr. C.N. monitored A throughout the test and felt A was focused and trying during the testing. (Testimony of Dr. C.N.; Respondent's Exhibit #3)

36. At the parents' request a meeting was held in January, 2001, to discuss the validity of the testing done by C.M. and the testing completed by Dr. C.N. on December 4, 2000. In attendance were A and his parents, Dr. C.N., an advocate for the parents, the District Director of Special Education, psychologist B.L., A's algebra teacher, the counselor and special education teacher, C.M. (Exhibit #27)

37. The meeting was lengthy. Different versions of what happened and how the numerical operations portion of the WIAT was administered to A were provided by C.M. and by A's father. (Exhibit #27)

38. At the hearing C.M. testified how she "usually"

administers the test. She described how she administered the test to A. She indicated that his memory of where he had been tested couldn't be correct because his memory was that he had been tested in the room next door to her and that he sat at a little round table. She indicated the room had been set up differently last year and there was no round table. She indicated A was placed in a small room inside the classroom with a glass wall. She sat directly outside and could view him through the glass wall. She followed the instructions provided by the test booklet, telling him where to begin and which questions to work on and to show his work. The test booklet contains precise directions as to what to say and what to do. At the end of a page of problems, she said she went into the glassed in room and folded the pages in the booklet to show the next problems and told him to try those. She testified that she went in to the room to do this about three times. Under cross examination, she revised the number of times she went in to four or five times. She indicated that she monitored him the entire time and that if he had used a calculator she would have seen it. (Testimony of C.M.)

39. At the hearing, A testified that he took the test in C.M.'s classroom. There was a small room there with a glass wall, but he was not placed in it. He was seated at a table near the front. The table was not round, but like a semi-circle. He stated "the middle was missing". She gave him the booklet, told him to show his work and to come and get her when he finished. She was not present the entire time he took the test. No aide or anyone else was present. She then left and went in to the

adjacent classroom through a flexible wall or "air door". He testified that on the first problems, which were easy, he did not use the calculator. When he got to harder problems, he took out the calculator and used it, thinking nothing about it, since it was permissible to use it in his other classes. He went into the other room and gave her the test when he finished. (Testimony of A)

40. In the tape recording of the meeting held on January 29, 2001, and offered for impeachment purposes, C.M. described her usual routine with her math students of taking them into the small room behind the glass wall and letting them do the test in there. She stated "I don't specifically remember him (A), but that's usually what I do". She also indicated that her aide is usually on the other side of the glass wall. (Tape recording, identified by the hearing officer as Respondent's exhibit #73)

41. The MET team report found that A was not eligible for special education services in the area of specific learning disability. Four people signed agreeing with this finding. Five people signed disagreeing with the finding. Psychologist B.L. did not sign the report. (Exhibit 27)

CONCLUSIONS OF LAW

1. The hearing officer has jurisdiction to hear this matter pursuant to 20 U.S.C. § 1415(b)(6) and § 1415(f)(1).

2. A multi-disciplinary team may determine that a child has a specific learning disability if (1) the child does not achieve

commensurate with his or her age and ability in one or more areas [including mathematics] and (2) the team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more areas. 34 CFR §300.541

3. A.R.S. §15-766 requires a district to review current evaluations including types of tests and the results of those tests prior to placing a student in a special education program.

4. The District's Guidelines for determining whether there is a significant discrepancy between a child's ability and achievement are based on The Arizona Department of Education's: Working Paper (1990) *Arizona Guidelines for the Identification of Students with Specific Learning Disabilities*. Phoenix, AZ: Arizona Department of Education.

5. Deviations from use of the Guidelines in determining discrepancy/eligibility are not violative of any state or federal law or regulations. The guidelines themselves provide that any deviations simply must be clearly documented with supporting data. In the case of Dr. C.N.'s evaluation in April, 2000, the basis for the deviation was documented by supporting data and the reasoning clearly explained.

6. That portion of the psycho-educational evaluation of A conducted by the school psychologist in February 2000 and the evaluation by the independent evaluator on 4/16/00 and 4/26/00 are both found by this hearing officer to be valid. Both used standardized tests and were well documented as to the results reached. The reasons given by the District for not considering or

accepting Dr. C.N.'s evaluation results are weak. Nonetheless, choosing not to use the higher verbal I.Q. score for A because that was not within the District's guidelines or general practice is understandable.

7. The failure to consider A's claim that he had used a calculator on the math portion of the WIAT, thus invalidating that portion of the test, however, is not supportable. The testimony of C.M. and of A as to where the test was administered and how it was administered are contradictory. C.M.'s testimony that she entered the glassed in room four or five times, took the test and folded the pages back to the next set of problems and spoke to him, giving him specific instructions from the test booklet, is in sharp disagreement with her statement on the tape recording that she did not specifically remember A. A's testimony is the more credible of the two.

8. Those persons on the MET team responsible for considering A's eligibility simply did not believe him. Given the mere suggestion that those test results were invalid, the district should have taken steps to retest him under proper monitoring conditions. Rather than do so, the efforts made were to discredit his statement that he used a calculator. It was left to the mother to have him retested on the math subtest by the independent evaluator.

9. A's test results on the Woodcock-Johnson clearly showed a severe discrepancy between ability and achievement and thus a specific learning disability in the area of mathematics. The District's guidelines were followed in determining the discrepancy

and the Woodcock-Johnson was a standardized test listed on the guidelines.

10. The District, nonetheless, questioned the validity of the results of the Woodcock-Johnson subtest. They questioned A's lack of performance and work in class prior to taking the second test.

They questioned his motivation in doing well on the test. They also indicated the correlation between the Woodcock-Johnson and the WISC III was less than between the WISC III and the WIAT.

11. Given the single issue before this hearing officer, the question became, which psycho-educational evaluation should be used, the District's or the independent evaluator's, in determining whether A was eligible for special education services with a specific learning disability in the area of mathematics?

DECISION AND ORDER

It is the decision of this hearing officer that the results of the WIAT subtest given to A are invalid.

The test administered by the independent evaluator, Dr. C.N. is valid and reliable and shall be used by the District in determining that A is a student with a specific learning disability in the area of mathematics.

IT IS ORDERED that student A is eligible for special education services with a specific learning disability in mathematics.

IT IS FURTHER ORDERED that the multi-disciplinary team for the District shall meet and develop an IEP for A in accordance with this decision.

APPEAL PROCESS

The decision of the Hearing Officer may be appealed by filing an appeal with the Division of Special Education, Arizona Department of Education, which shall conduct an impartial review of the hearing.

a. Such an appeal shall be accepted only if it is initiated within 35 days after the decision of the hearing officer has been received by the Parties. An extension of time for filing the appeal may be granted by the Division of Special Education for cause. Appeals must be forwarded to the Division of Special Education, Arizona Department of Education, 1535 W. Jefferson, Phoenix, Arizona 85007.

Dated this 7th day of May, 2001.

Elizabeth B. Harmon
Hearing Officer

Copy of the foregoing
mailed by Certified mail
this 8th day of May,
2001, to:

Robert D. Haws, Esq.
Jennings, Strouss & Salmon, P.L.C.
One Renaissance Square
Two N. Central Ave., Suite 1600
Phoenix, AZ 85004-2393

Lucy M. Keough, Esq.
7000 N. 16th St., Ste. 120-301
Phoenix, AZ 85020

Original of the foregoing
Mailed by Certified mail this
8th day of May, 2001, to:

Theresa A Schambach
Dispute Resolution Coordinator
Arizona Department of Education
Exceptional Student Services
1535 W. Jefferson, Phoenix, AZ 85007